Supreme Court, U.S.
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No. 02-1092

IN THE

Supreme Court of the United States

ACCRUED FINANCIAL SERVICES, INC.,

Petitioner,

v.

PRIME RETAIL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Prime Retail, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. It is the sole general partner of Prime Retail, L.P. Horizon Group Properties, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Prime Retail, Inc. and Prime Retail, L.P. own, directly or indirectly, 100 percent of each of the other corporate respondents or those respondents have merged into Prime Retail, Inc., except that Third HGI, L.L.C. is owned by Horizon Group Properties, Inc. and Horizon Group Properties, L.P. HGI Perryville, Inc. has changed its name to Prime Outlets at Perryville, Inc., and is owned 100% by Prime Retail, Inc.

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REASONS FOR DENYING THE PETITION

Petitioner admits that the substantive issues presented in this case are "relatively obscur[e]." Pet. at 30. Petitioner does not assert that the questions presented meet any of the considerations governing review on certiorari set forth in Supreme Court Rule 10. Rather, Petitioner urges the grant of a writ of certiorari so that this Court may "clarify" issues regarding the determination of federal public policy and judicial federalism. Pet. at 2. Petitioner also contends that "the decision below is incorrect." Pet. at 27.

Petitioner's request for a writ should be denied. The decision of the Fourth Circuit Court of Appeals in this case is not in conflict with the decision of any other United States court of appeals, and is well within the accepted and usual course of judicial proceedings. By Petitioner's own admission, the substantive issues involved in this case are not of great importance to the public. *See Layner and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ). Finally, this case neither presents a compelling platform to "clarify" issues of federal public policy or judicial federalism nor was it decided in error. The decision below is a narrow, fact-dependent ruling based exclusively upon state law. The Fourth Circuit held that certain assignments obtained by Petitioner violated the public policy of the state of Maryland because they were barratrous. Pet. at 16a-17a. The court determined Maryland's public policy in accord with accepted and usual practice: it looked to Maryland statutes and case law. Indeed, the Court relied on a Maryland statute explicitly prohibiting barratry as a clear legislative expression of Maryland's public policy on this issue. *See* Md. Code Ann., Bus. Occ. & Prof. Article, § 10-604(a)(1); Pet. at 15a.

A.

THE DECISION BELOW DOES NOT RAISE ISSUES RELATING TO THE FEDERAL COURTS' POWER TO DETERMINE PUBLIC POLICY THAT ARE WORTHY OF CONSIDERATION ON CERTIORARI

Petitioner advances two arguments in support of its assertion that the writ should be granted to clarify the limits of federal judicial power to articulate public policy. These are addressed in order below.

Petitioner first asserts that the Fourth Circuit barred testimony by an expert receiving a contingent fee, in conflict with a later evidentiary ruling by a federal bankruptcy court, namely, *In re Joy Recovery Technology Corp.*, 286 B.R. (Bankr. N.D. Ill. 2002). Pet. at 15. The Fourth Circuit, however, made no such evidentiary ruling. Rather, the court, as an alternate holding, stated that Petitioner's assignments were void as "against public policy insofar as they provide for supplying *expert* testimony for a contingent fee." Pet. at 17a (emphasis in the original). Thus, the court's ruling did not bar the introduction of evidence, but rather denied Petitioner standing to bring the claim, as its standing was premised upon an invalid assignment of claims. Pet. at 39a-40a. Accordingly, there is no conflict with the *evidentiary* ruling made by the bankruptcy court in *In re Joy Recovery Technology Corp.* In any event, "[t]he Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or another circuit." Stern and Gressman, *Supreme Court Practice* (8th Ed. 2002) at 237.

Petitioner next contends that the court below erroneously failed to apply federal law and policy to determine Petitioner's standing to prosecute federal claims. Pet. at 17. Petitioner admits that this issue "is not itself worthy of consideration on certiorari." *Id.* Respondent agrees. Moreover, neither the decision nor the record below presents this question. The court below relied on Maryland law to determine the validity of assignments encompassing "any and all causes of action." Pet. at 13a, 16a. This broad contractual assignment did not call for the application of federal law, and, as the majority opinion notes, Petitioner argued to the Fourth Circuit only the applicability of Maryland and California (not federal) law in its argument to the Fourth Circuit. Pet. at 10a.

B.

THE DECISION BELOW DOES NOT RAISE ISSUES RELATING TO THE DETERMINATION OF STATE LAW THAT ARE WORTHY OF CONSIDERATION ON CERTIORARI

There are two strands to Petitioner's argument that certiorari should be granted to clarify the federal courts' discretion in determining state law. First, Petitioner declares that "some federal courts determine and apply state law using a predictive or 'status quo' approach with little or no enunciated rationale for doing so." Pet. at 20. In its discussion, however, Petitioner makes no attempt to relate this issue to the decision below. Indeed, Petitioner admits that the Fourth Circuit grounded its conclusion regarding Maryland public policy upon a state statute prohibiting barratry. Pet. at 10. The court's use of state law as the basis for a determination of the state's public policy is hardly such

a departure "from the accepted and usual course of judicial proceedings" as to warrant the grant of a writ of certiorari. Supreme Court Rule 10(a).

Next, Petitioner urges that the writ be granted so that this Court may articulate standards to determine when a federal court should certify a question to a state court. Once again, this is not an issue raised by the decision below. Petitioner did not move to certify a question of state law to the Maryland Court of Appeals until it filed its motion for rehearing en banc, which, of course, was after the Fourth Circuit had rendered its decision. Pet. at 14. That motion was denied without comment. *Id.* The panel majority did not "decid[e] whether to employ an available certification procedure," as that issue was not before it. Pet. at 27. Accordingly, the Fourth Circuit's decision is not an appropriate vehicle for articulating standards regarding certification of state law questions, as urged by Petitioner. Moreover, as Petitioner correctly notes, this Court has previously "expressed its view as to the use of certification procedures by federal courts," and this case presents no compelling reason to revisit the issue. *See Lehman Brothers v. Schein*, 416 U.S. 386, 395 (1974) (Rehnquist, J., concurring); *see also Fiore v. White*, 528 U.S. 23, 29 (1999); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988); *Arizonians for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997); *Belloti v. Baird*, 428 U.S. 132, 146-47, 150-51 (1976).

C.

THE FOURTH CIRCUIT CORRECTLY DECIDED THIS MATTER

The grant of a writ is not appropriate merely to correct alleged error in a narrow, fact-dependent ruling which the parties agree involves "obscure" issues. Pet. at 30; Stern and Gressman at 459. This matter, however, was correctly decided.

The court correctly applied Maryland conflicts law in concluding that Maryland law applied to determine the validity of Petitioner's assignments. In particular, the court's opinion fully addressed whether Petitioner's assignments violated a strong public policy of Maryland. Relying on a statute expressly prohibiting "officious meddling" as contemplated by Petitioner's assignments, the court determined that such a strong public policy existed. Pet. at 15a-16a.

The court's conclusion that Petitioner's assignments violated this strong public policy was amply supported by the record. Petitioner, a self-styled "auditor" of fees charged to outlet center tenants, obtained assignments from certain tenants of Respondents' outlet centers of any claims they might have with respect to overcharges. Pet. at 6a. The Fourth Circuit correctly concluded that the assignments gave the outlet center tenant/assignors little control over litigation that the Petitioner might commence. Pet. at 13a. Pursuant to the assignments, Petitioner was to recover up to 50% of the alleged overcharges Petitioner purportedly uncovered, known in the assignments as the "Discrepancy," if the tenant recovered the Discrepancy from the landlord. If Petitioner

presented the Discrepancy to the tenant and the tenant declined to pursue recovery from the landlord, Petitioner was entitled to 40% of the Discrepancy — a figure unilaterally determined by Petitioner — as a "Cancellation Fee." Pet. at 6a. The effect was to make it financially prohibitive for the tenant to withdraw.

The assignments purported to assign to Petitioner all causes of action the tenants might have against the landlords to recover the Discrepancy. Litigation was the sole means contemplated in the assignments by which Petitioner might recover on the causes of action. If litigation occurred, the cost of litigation, including attorneys' fees, was subtracted from the recovery before determination of Petitioner's fees. Petitioner retained full discretion to accept or reject any settlement offers. If the tenant prevailed upon Petitioner to drop a legal action after the action has been commenced, the tenant became liable to Petitioner for Petitioner's litigation costs, including attorneys' fees. Pet. at 6a-7a.

As the Fourth Circuit noted, the tenants' rights were assigned, not in exchange for an existing value, but for future fees to be determined by decisions and value judgments controlled by Petitioner. Pet. at 12a. This gave Petitioner freedom to put a value on the Discrepancy without challenge by the tenants. It also gave Petitioner every incentive to render its value judgments in favor of finding a Discrepancy, so it could recoup the time and expense it had invested in its audit. Thus, Petitioner was given "the power to mine lawsuits, promote them, and profit off them without regard to the intent and desires of the injured party." Pet. at 16a. This arrangement, the Fourth Circuit properly found, violated Maryland public policy as codified in its statute outlawing barratry. Pet. at 15a.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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